STATE OF DELAWARE

PUBLIC EMPLOYMENT RELATIONS BOARD

DELAWARE STATE UNIVERSITY CHAPTER AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS,	:	
Charging Party,	:	**Review of Hearing Officer's Decision U.L.P. No. 95-10-159**
v.	:	
DELAWARE STATE UNIVERSITY,	:	
Respondent.	:	

DECISION ON REMAND

This matter stems from an unfair labor practice charge filed on October 5, 1995 by the Delaware State University Chapter of the American Association of University of Professors ("AAUP") against the Delaware State University ("DSU"). AAUP alleged that DSU violated 19 Del.C. §§ 1307(a)(5) and (a)(8). Specifically, AAUP alleged that DSU failed and/or refused to provide requested information which is necessary to its obligation to fairly represent the bargaining unit.

Over the past few years, several issues have been appealed to the Delaware Court of Chancery. The most recent appeal involved the issue of whether this Board should defer its decision relating to the unfair labor practice charge in a right-to-information case to the contractual arbitration process as set forth in the collective bargaining agreement between DSU and AAUP. The Court of Chancery found that the Board erred as a matter of law by failing to apply the standard for deferral set forth by the Delaware Supreme Court in City of Wilmington v. Wilmington Firefighters Local 1590, Del.Supr., 385 A.2d 720 (1978). Delaware State

University v. DSU Chapter of the American Association of University Professors, Del.Ch., C.A.No. 1389-K, Strine, V.C. (May 9, 2000).

Specifically, the Court found that this Board failed to explain why the City of Wilmington standard of deferral should not apply in the instant case and had failed to explain why the request-for-information exception to the pre-arbitral deferral policy recognized in federal cases should be adopted under this state's public employment relations scheme. Id. Thereafter, the Court remanded this matter to this Board for the Board's "articulation and careful justification of the deferral standard that the Board believes will most effectively advance the purposes of Delaware's public employment relations statues and for a redetermination of the deferral question in accordance with that standard." Id. at 4-5. In other words, the Chancery Court did not require this Board to adopt City of Wilmington in right-to-information cases if this Board believes that another approach would best suit this State's labor relations policies. The Board finds that the standard as applied by the National Relations Board and recognized by the United States Supreme Court in NLRB v. Acme Industrial Co., 385 U.S. 432 (1967) will best serve the needs of Delaware labor relations.

Section 1307 (a)(5) of the Delaware Public Employment Relations Act ("PERA") provides that "it is an unfair labor practice for a public employer or its designated representative to . . .[r]efuse to bargain collectively in good faith with an employee representative which is the exclusive representative of employees in an appropriate unit, except with respect to a discretionary subject." 19 Del.C. §1307(a)(5). In finding a public school employer violated its duty to bargain in good faith, the Chancery Court found:

> The statutory duty of representation necessarily encompasses the right to conduct a reasonable investigation which, it not otherwise privileged, includes access to relevant information necessary for the bargaining representative to intelligently determine facts,

> assess its position, and decide what course of action, if any to pursue. The duty to furnish such information extends beyond the negotiations to the day to day administration of the collective bargaining agreement. To conclude otherwise would render the entire representation process meaningless.

Board of Education of Colonial School District v. Colonial Education Association, Del.Ch., C.A.No. 14383, Slip Op. at 16-17, Allen, C. (Feb. 28, 1996), aff'd, Del.Supr., 685 A.2d 361 (1996). Moreover, employers are statutorily required to furnish information necessary for the processing of grievances. Id.

The PERA's requirement that an employer bargain in good faith is modeled after Section 8(a)(5) of the National Labor Relations Act, 29 U.S.C. §158(a)(5). Similarly, under Section 8(a)(5), an employer is obligated to provide relevant information which aids the arbitral process. Acme Industrial, 385 U.S. at 438.

In City of Wilmington v. Wilmington Firefighters Local 1590, Del.Supr., 385 A.2d 720,723 (1978), prior to the enactment of the PERA, the Delaware Supreme Court adopted the federal pre-arbitral deferral policy, under which the National Labor Relations Board (NLRB) "refrains from exercising jurisdiction in respect of disputed conduct arguably both an unfair labor practice and a contract violation when . . .the parties have voluntarily established by contract a binding settlement procedure." The NLRB defers in order "to require the parties . . . to honor their contractual obligations rather than casting the dispute in statutory terms, to ignore their agreed upon procedures." Id. The Delaware Supreme Court favored the practice of deferring to the arbitration procedures when the issue is a refusal-to-bargain. Id. 723-724.

In Acme, however, the United States Supreme Court created an exception to deferral in right-to-information cases and held that the NLRB need not "await an arbitrator's determination

of the relevancy of the requested information before it can enforce the union's statutory rights [to information] under Section 8(a)(5). Id. at 436. The court found:

> Far from intruding upon the preserve of the arbitrator, the [NLRB]'s action was in aid of the arbitral process. Arbitration can function properly only if the grievance procedures leading to it can sift out unmeritorious claims. For if all claims originally initiated as grievances had to be processed through to arbitration, the system would be woefully overburdened. Yet, that its precisely what the respondent's restrictive view would require. It would force the union to take a grievance all the way through to arbitration without providing the opportunity to evaluate the merits of the claim. The expense of arbitration might be placed upon the union only for it to learn that the machines have been relegated to the junk heap. Nothing in federal law requires such a result.

Id. at 569.

A union cannot be required to arbitrate without the information necessary to a full assessment of its claim and, at the arbitration hearing, must have access to data that might indicate that the grievance should not have been arbitrated in the first place. Worcester Polytechnic Institute, Nat.L.Rel.B., 213 NLRB 306, 309 (1974). Without the exchange of adequate information, the collective bargaining process cannot function effectively. The union must have relevant non-privileged information to intelligently determine facts, assess its position and decide what course of action, if any to pursue. Board of Education of Colonial School District, Slip Op. at 16. Union access to adequate information concerning grievances and/or potential grievances enables the union to make considered judgments about the merits of the claims, to eliminate frivolous or unmeritorious grievances at an early stage of the process and where necessary to prepare for arbitration. The usual contractual grievance procedure contains several steps ending in final and binding arbitration. Requiring the public employer to provide such information supports the resolution of disputes at the lowest possible level. The failure to

produce requested documentation simply moves the grievance to the next step and overburdens the arbitration system. Acme Industrial Co.,385 U.S. at 438.

A union should not be required to file a second grievance to determine its right to information in the first grievance. A two-tiered approach would be inconsistent with the policy of favoring the voluntary and expeditious resolution of disputes through arbitration. General Dynamics Corp., Nat.L.Rel.B., 268 NLRB 1432 (1984).

The purpose of PERA is "to promote harmonious and cooperative relationships between employers and their employees." 19 Del.C. §1301. The Board believes that controversies between employers and employees involving right to information are best resolved by the Board. This case notwithstanding, the prompt submission of unfair labor practice allegations to the Board for disposition advances the legislative purpose in a manner consistent with the policy of the statute.

CONCLUSION

Consistent with the foregoing discussion, the Board adopts the standard of the United States Supreme Court, as set forth in Acme Industrial Co. in declining to defer to arbitration issues involving alleged violations of the duty to bargain in good faith in request-for-information cases. For the reasons stated herein, the Board affirms the decision of the Hearing Officer and does not defer this matter to the arbitration process. In addition, the Board affirms the decision that DSU violated 19 Del.C. §1307(a)(5) when it refused to provide to the AAUP information which was reasonably related to the AAUP's responsibility to represent bargaining unit members and to the day-to-day administration of the partie's collective bargaining agreement.

IT IS SO ORDERED.

/s/Henry E. Kressman
Henry E. Kressman
Board Chair

/s/R. Robert Currie, Jr.
R. Robert Currie, Jr.
Board Member

/s/Elizabeth D. Maron
Elizabeth Daniello Maron, Esq.
Board Member

Dated: July 20, 2001